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In the Supreme Court of the United States

OCTOBER TERM, 1993

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
PETITIONER

v.

REIMER & KOGER ASSOCIATES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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(2)

QUESTION PRESENTED

Whether the lower courts correctly rejected petitioner's argument that the Resolution Trust Corporation was not entitled to remove this case from state court under 12 U.S.C. 1441a because the claims against the Resolution Trust Corporation were frivolous for purposes of *Bell* v. *Hood*, 327 U.S. 678 (1946).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-18) is reported at 4 F.3d 614.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1993. A petition for rehearing was denied on October 12, 1993. Pet. App. 19. On December 22, 1993, Justice Blackmun granted an extension to and including February 9, 1994, of the time within which to file a petition for a writ of certiorari. Pet. App. 22. The petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March of 1991 the Resolution Trust Corporation (RTC) was appointed receiver for Home Savings Association. In June of 1991 petitioner Kansas Public Employees Retirement System filed suit in a state court in Kansas against petitioner's investment manager, seeking to recover losses on petitioner's investment of $65 million in debentures issued by Home Savings. In December of 1991 petitioner amended its complaint to assert causes of action against a variety of additional parties, including former officers and directors of Home Savings (the Morgan respondents).[1] Those causes of action generally alleged that the Morgan respondents fraudulently had induced petitioner to invest in Home Savings. See Pet. App. 4-5; Pet. 5.

After the Morgan respondents unsuccessfully sought dismissal of the claims against them based on their view that any claims against them were held by the RTC as receiver of Home Savings, they filed a third-party petition against the RTC on October 2, 1992. That petition argued that any loss was caused by negligent mismanagement of Home Savings by the RTC in its corporate capacity, and alternatively argued that the Morgan respondents were entitled to indemnity from the RTC as receiver. See Pet. App. 5.

Late in the afternoon of October 8, 1992, petitioner's counsel, without contacting counsel for the Morgan respondents or the RTC, arranged an ex parte hearing before the state judge handling the case. At that hearing petitioner's counsel sought an emergency order severing the third-party claims against the RTC from petitioner's

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[1] See Pet. 5 (referring to the former officers and directors of Home Savings as the Morgan defendants).

claims against the Morgan respondents. Counsel stated that if the judge did not sever the claims the RTC would be able to remove the entire case to federal court. The state judge thereupon issued an order severing the third-party claims against the RTC from petitioner's claims against the Morgan respondents. Morgan Resp. App. 1-2 (order of state court); see Pet. App. 5-7.

2. Five days later, the RTC filed a notice removing the entire case to the United States District Court for the Western District of Missouri (the district containing the principal place of business of Home Savings) under 12 U.S.C. 1441a (Supp. IV 1992). Petitioner urged the district court to remand the "original case" to the state court, arguing that the state court's severance order had created two separate cases, and that the RTC was not a party to the case brought by petitioner against the Morgan respondents. The district court held a hearing, at which petitioner's counsel acknowledged that the state court had severed the cases solely to prevent removal by the RTC. The district court then concluded that "the attempt to sever a case into two cases for the sole purpose of defeating a right conferred by Congress on the RTC to remove any case in which it was a party is void because it violates the Supremacy Clause in Article VI, Clause 2 of the United States Constitution." Pet. C.A. App. A4; see Pet. App. 6-8.

The court also rejected petitioner's claim that the Morgan respondents' claims against the RTC were so frivolous that they could not confer subject-matter jurisdiction on the federal district court. Pet. C.A. App. A6; see Pet. App. 7-9.

The district court certified the case for interlocutory appeal under 28 U.S.C. 1292(b). Pet. C.A. App. A1-A2; see Pet. App. 9.

3. The court of appeals affirmed. Pet. App. 3-18.

a. The principal issue addressed by the court of appeals was the question whether the district court properly concluded that the RTC was entitled to remove the entire case even though, before the RTC filed a notice of removal, the state court had issued an order purporting to sever petitioner's claims against the Morgan respondents from the claims against the RTC. Pet. App. 9-15. On that question, the court of appeals affirmed the district court for two alternative reasons. First, the court agreed with the district court's conclusion that the severance order was void, explaining that "the federal courts should not condone a procedure intended to prevent removal when a party has the right to remove." *Id.* at 11-13. Second, the court explained that removal of the entire case would have been proper even if the severance order were effective, because the RTC's interest as a third-party defendant would have entitled it under Kansas procedural rules to participate in the state-court proceedings regarding petitioner's claim against the Morgan respondents. In the view of the court of appeals, that entitlement to participate in the proceedings on petitioner's complaint gave the RTC a sufficient interest in that portion of the proceedings to justify its removal of that portion of the proceedings to federal court. *Id.* at 13-15 (citing *Nolan* v. *The Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), cert. denied, 499 U.S. 962 (1991)).

b. The court of appeals also rejected petitioner's argument that the claims of the Morgan respondents against the RTC were so frivolous that they could not form a basis for federal jurisdiction. Pet. App. 15-18. The court explained that a claim could be dismissed for want of jurisdiction as frivolous only if it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly

insubstantial and frivolous." *Id.* at 15 (quoting *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946)). The court then reviewed both of the claims brought by the Morgan respondents against the RTC and concluded that neither of them was "so patently without merit as to justify . . . the court's dismissal for want of jurisdiction." Pet. App. 18 (quoting *Bell*, 327 U.S. at 683).

ARGUMENT

Petitioner apparently no longer presses the main question decided by the court of appeals: whether the Supremacy Clause rendered void the state court's order severing the third-party claims against the RTC from petitioner's claim against the Morgan respondents. Rather, petitioner appears to limit its argument in this Court to the contention that removal was improper because the claims against the RTC were frivolous.[2] In our view, removal was proper even if the claims were frivolous. In any event, the factbound question whether the claims at issue here were frivolous does not warrant review by this Court.

1. At the outset, petitioner's argument rests on the implicit premise that the rule articulated in *Bell* v. *Hood*, 327 U.S. 678 (1946)—which allows dismissal of a suit for want of subject-matter jurisdiction where the federal claims are frivolous—applies in cases where the federal court's jurisdiction is based on a party's status rather than the existence of a federal question.

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[2] Petitioner does argue (Pet. 16-17) that the state court's severance order did not violate the Supremacy Clause, but the basis for that argument is the contention that the claims against the RTC were frivolous. For the reasons explained in Point 2, *infra*, petitioner's challenge to the substantiality of the claims against the RTC does not warrant review.

That premise is incorrect. The doctrine of *Bell* is a limitation on federal subject-matter jurisdiction. It holds that "[n]ot every case arising under federal law is within federal question jurisdiction." 13B Charles Alan Wright et al., *Federal Practice and Procedure* § 3564, at 66 (2d ed. 1984) (internal quotation marks and footnotes omitted). The doctrine rests on the view that a plaintiff should not be able to manufacture federal jurisdiction over a case that otherwise would not be cognizable in federal court solely by including a wholly insubstantial claim based on federal law. See *Bell*, 327 U.S. at 682-683 (referring to a federal claim that "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction").

There is no basis for applying that doctrine in a case like this one, where federal jurisdiction rests not on the general federal question statute (28 U.S.C. 1331), but instead on a statutory grant of jurisdiction based on the presence of a specific party, in this case the RTC.[3] Because the requirements for federal jurisdiction in this case are entirely satisfied by the presence of the RTC—whether the claims the Morgan respondents have made against the RTC arise under federal law or state law—there is no reason to conclude that the federal court would lack jurisdiction over the case simply because the claims involved in the case are frivolous. Rather, the appropriate response to a determination that the claims

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[3] There can be no doubt that the federal question implicated by the federal creation of the RTC is sufficiently substantial to satisfy any constitutional threshold necessary for federal-question jurisdiction under the *Bell* doctrine, as demonstrated by the Court's recent reaffirmance of the permissibility of party-based jurisdictional grants in *American National Red Cross* v. *S.G.*, 112 S. Ct. 2465 (1992).

are frivolous would be dismissal of the claims on the merits.[4]

The impropriety of applying the *Bell* doctrine in cases involving party-based jurisdictional grants is evidenced by the tension between the effect of that doctrine and the purpose of party-based jurisdictional grants in giving certain federal entities the protection of a federal forum for adjudication of claims against them. It would make no sense to say that the RTC is entitled to a federal forum when plaintiffs present serious claims against it, but that it is remitted to a state forum for continuing litigation of claims that a federal court determines to be frivolous. Accordingly, removal was proper even if the claims against the RTC are frivolous.[5]

2. In any event, the court of appeals' determination that the claims were not sufficiently frivolous to justify dismissal even if the *Bell* doctrine applied does not warrant review by this Court. As this Court explained in *Hagans* v. *Lavine*, 415 U.S. 528 (1974), the threshold level of substance necessary for a claim to pass the *Bell* test is quite low. A claim is inadequate "only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Id.* at 538 (internal quotation marks omitted).

Whatever one thinks about the claims raised by the Morgan respondents—and the RTC believes that those

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[4] The RTC has filed motions in the district court seeking dismissal of the claims against it. See RTC C.A. Br. 13.

[5] The court of appeals noted the presentation of this argument by the Morgan respondents (Pet. App. 16 n.6), but had no occasion to reach it given its conclusion that the claims against the RTC were not frivolous.

claims are meritless—the RTC has not argued, and it would be difficult to conclude, that the claims are so plainly frivolous as to leave no room for the inference that they can be the subject of controversy. For example, although the RTC has rejected the Morgan respondents' claim for indemnity, petitioner's argument that the claim is frivolous (Pet. 11-12) does not identify any specific regulatory provision that indubitably bars the claim, or any controlling decision of this Court or the court of appeals addressing such a claim. Similarly, although petitioner argues (Pet. 12-13) that respondents could not recover on the indemnity claim because the receivership estate is insolvent, the lack of funds to repay all investors entirely does not necessarily establish the lack of funds to pay any amount whatsoever to unsecured claimants. Because the record does not establish that unsecured claimants (a category that would include the Morgan respondents if their claims had merit) would receive nothing on their claims against the receivership estate, petitioner errs in arguing that the indemnification claim cannot possibly succeed because of the estate's insolvency.

Similarly, petitioner argues (Pet. 13-14) that the claim for negligent mismanagement by the RTC is barred by this Court's decision in *United States* v. *Gaubert*, 499 U.S. 315 (1991). Although the RTC shares the view that the claim is meritless, the fact remains that application of the discretionary function exception to the Federal Tort Claims Act at issue in *Gaubert* is exceedingly fact-specific. Accordingly, the possibility of a discretionary-function defense does not render the negligence claim so frivolous that it would not support federal jurisdiction under *Hagans* and *Bell*.

The question whether the claims brought against the RTC by the Morgan respondents are wholly insubstan-

tial turns on a particularized evaluation of the claims. The court of appeals' performance of that evaluation does not raise a legal question of general significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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